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NO. 84-443

In the Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST N. MORIAL, ET AL
and the Class they Represent,

Petitioners

vs.

UNITED GAS PIPE LINE COMPANY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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9 pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
I. NEW DEVELOPMENTS 2
II. CONCLUSION 4
CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

CASES **PAGE**

Fidelity Union Trust Co. v. Field,
311 U.S. 169 (1940) 4

West v. American Telephone & Telegraph Co.,
311 U.S. 223 (1940) 3

STATUTES

Fed.R.Civ.P. 17 . . . . . 2, 5
Fed.R.Civ.P. 24 . . . . . 2, 4, 5

OTHER AUTHORITIES

Rule 22.6 of the Rules of the Supreme Court 1

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, Ernest N. Morial, *et al*, file this Supplemental Brief pursuant to Rule 22.6 of the Rules of the Supreme Court to respectfully invite this Court's attention to two intervening matters. This case involves the intervention of the Ratepayers and/or City Officials of the City of New Orleans ("City") in a price dispute of powerplant gas supplied by respondent, United Gas Pipe Line Company ("United"), for the benefit of the Ratepayers, to the electric utility serving the City of New Orleans, New

Orleans Public Service, Inc. ("NOPSI"). It involves important questions as to the scope of Fed.R.Civ.P. 24 and 17; whether federalism continues to require to have federal courts defer to state courts' interpretation of state law rendered in an action between the same parties in the same capacity; and the right of access to the courts of parties who solely and directly suffer damages as a result of the acts of the defendant.

I. NEW DEVELOPMENTS

The Petition, *inter alia* on pages 7 and 23, discusses a state court proceeding in which a judgment was granted to the City, Class of Ratepayers and NOPSI in the amount of $44.5 million for United's breach of powerplant contract it entered into with NOPSI, for damages incurred due to shortages of gas on United' systems. Despite United's consistent challenges, and its reliance on the Fifth Circuit decision from which the Petitioners herein seek relief, the City and Class have been maintained as party-plaintiffs in the state court suit for more than 10 years. (*City of New Orleans, et al v. United*, pending on the docket of the Civil District Court for the Parish of Orleans).

Subsequent to the filing of the Petition for Writ of Certiorari on September 19, 1984, the state trial court ruled on a motion for new trial filed by United. In its motion, United raised a total of six issues. One of the issues was the standing of the City and the Ratepayers as co-plaintiffs in the state court proceeding. United argued to the state court that its judgment was contrary to law and evidence as the City and the Class of NOPSI's Ratepayers do not have a right of action against United, relying, *inter alia*, on the Fifth Circuit court decision appended as Appendix H to the original Petition herein. United, in a supporting

memorandum, admitted that the trial court in its Reasons for Judgment, stated that the reason for joint award to the City/Class and NOPSI of $44.5 million in damages was that the amount of damages "...was borne directly by the Ratepayers...".

This was the fourth time that United raised this issue in the state trial court; it has also raised this issue in the state intermediate appellate court and the state supreme court. All state courts rejected, or denied review of, United's contentions.

On October 8, 1984, the state court "after considering the pleadings and arguments of counsel" denied United's motion for new trial, maintaining the status of the City and Ratepayers as party-plaintiffs.

Additionally, United has filed an appeal of this decision to the state appellate courts (Fourth Circuit Court of Appeal, State of Louisiana), and has announced its intention to pursue appeals to the highest court of competent jurisdiction.

United, in its urging that the state court decisions should be ignored, puts the federal courts in an untenable position. It encourages the federal courts to substitute their view for that of the state courts. This Court has always been very mindful of the proper role of federal and state courts. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 at 236-38 (1940).

It would undermine the authority and respect the federal courts' command if these are free to ignore state courts' interpretations of the state's own laws. It will be difficult, if not impossible, to explain to the Ratepayers

that they are able to obtain a judgment of $44.5 million against United in state court as a party-plaintiff, while the federal courts close their doors to them. *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 177-80 (1940). Justice requires that the Ratepayers be heard, and a reaffirmance of the *Erie* doctrine is in order, allowing the Ratepayers and/or the City to intervene in this proceeding.

If this Court has any doubts about the future interpretation of this issue of state law on appeal in the state courts, then Petitioners submit in the alternative, that a more proper procedure would be to stay the federal proceeding pending a final decision by a state court of highest jurisdiction reviewing the state court case, rather than ignoring the state courts. Federalism requires that the federal judiciary give due deference to the state courts' interpretations of their own laws. This policy is not served by rewarding United's mere change of corporate citizenship with an unexpected bounty: their not having to deal with the injured ratepayers. United's actual presence and potentiality of harm to Louisiana residents was not changed with its change of corporate domicile, only the Ratepayers' ability to obtain redress.

II. CONCLUSION

United, in its Brief in Opposition to the Petition herein, has not dealt with the real issues in this case: It has not cited any case in which the applicants for intervention are the only parties who actually paid for the damages through a "pass-through" device. It has not discussed the real existing differences in the Circuits in the application of Fed.R.Civ.P. 24, and the need of the bench and bar for this Court to give guidance in the interpretation of this Rule. It has ignored the argument that the requirements under

Fed.R.Civ.P. 17(a) are different from those under Rule 24(a), and that if the Fifth Circuit Court decision is allowed to stand, Rule 24 is, in effect, removed from the Federal Rules of Civil Procedure. It has not dealt with the devasting economic effect on the Ratepayers that may result if its counterclaim is found to have merit.

It actually advocates that this Court ignore the state court interpretations in litigation involving the same jurisprudence and authorities. As the dissenting judges in the Fifth Circuit Court opinion below stated:

> Only by ignoring the realities of the situation can inexorable and insensitive logic lead to the denial of intervention in this case. (App. H at 89).

This Court should grant certiorari herein to give guidance to the bench and bar as to the correct scope of Rule 24 and to reaffirm its directives that lower courts should show deference and comity to state court decisions and to limit federal courts' interpretations of state law to instances where the state courts have not clearly spoken.

Respectfully submitted,

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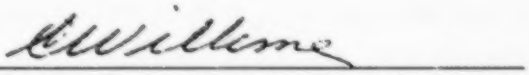
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petitioners' Supplemental Brief has been served upon all counsel of record herein by placing same in the U.S. mail, postage prepaid and properly addressed, this 25th day of October, 1984.



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